Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1154

GERALD P. WOLF,
Petitioner, Plaintiff

vs.

TERRI L. WOLF
Respondent, Defendant

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Gerald P. Wolf, pro se
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INTRODUCTION

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment of the Supreme Court of the State of Ohio dated September 20, 1973 and filed October 3, 1973 which dismissed the appeal from the judgment of the Court of Appeals of Greene County, Ohio, Second Appellate District, entered on May 15, 1973, dismissing the appeal of the decision handed down by the Common Pleas Court of Greene County, Ohio, entered October 30, 1972, as to the care and custory of the petitioner's minor child.

OPINIONS BELOW

No opinion was rendered in the Supreme Court of Ohio, which dismissed the appeal for not raising a substantial constitutional question without a hearing on the merits. The opinion of the Second Appellate Court entered April 18, 1973 will be found in the Appendix, P. A3. The findings of the Common Pleas court dated August 30, 1972 will be found in the Appendix, p. A6.

JURISDICTIONAL GROUND

(1) The judgment of the Supreme Court of Ohio (p. A2) was dated on September 20, 1973, and filed October 3, 1973.

(2) On December 14, 1973, Mr. Justice Stewart signed an order extending the time for filing this petition for writ of certiorari, to and including January 28, 1974 (p. A1).

(3) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

This case is brought under the statutes of the United States invoking the discretionary power of this Court to obtain a reinstatement of the case and reversal of the trial court's findings as to child custody. The issues herein relate to the state court's denial of the petitioner's right to equal protection and due process of law in dismissing the instant case. More precisely, these issues are:

1. Whether a father and his infant child can be denied their mutual care, company, love and companionship by a trial court's arbitrary award of custody to the mother contrary to the laws of Ohio when it found "everything else (all elements effecting custody) being equal," change of custody without the due process elements of notice and a meaningful opportunity to be heard, and denial of an impartial tribunal.

2. Whether the Ohio judiciary unconstitutionally and discriminatorily applied its own procedural rules in dismissing the petitioner's case on a procedural technicality no fault of his own, which technicality did not affect the substantive rights of the defendant, his opponent.

3. Whether the Appeals Court abused its discretion under Ohio Appellate Rule 10(D), Civil Procedure Rule 6(B)(2), or any other rule in failing to grant leave to file the transcript of the Common Pleas

Court proceedings when such late filing was not prejudicial to the appellee, no want of prosecution was shown, and no objection was raised by opposing counsel, but was prejudicial to the appellant in denying a litigant the right of appeal because of a human error by counsel, contrary to the intent of the law and Civil Procedure Rule 61.

4. Whether the Appellate Court failed to properly exercise its discretion under Ohio Appellate Rule 9(E) by not remanding the case for filing of the trial judge's findings, which were material to the appeal, in the lower court record when such findings were timely requested and Ohio Civil Procedure Rule 52 requires they be made a part of the record when so requested.

5. Whether the Ohio Appellate Court failed to take cognizance of constitutional rights of the minor child, abridged in discrimatorily denying one of the parents the right of appeal, due process, elemental fairness, in that defendant's trial lawyer was a judge of the court, and equal protection under the law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision relevant to the decision of this case is the Fourteenth Amendment to the United States Constitution, set out in the Appendix (p. A10). The federal statutes, Ohio Appellate Rules, and Ohio Rules of Civil Procedure involved are set out in the Appendix, beginning at p. A11.

STATEMENT OF THE CASE

This petition seeks a review of trial court findings made in the Greene County Common Pleas Court on August 30, 1972 and filed October 30, 1972, Appendix, p. A3.

The petitioner-plaintiff Gerald P. Wolf filed for divorce and custody of his minor child, Jayme Lynn Wolf, on October 4, 1971; respondent-defendant Terri L. Wolf cross-filed for divorce and custody on October 7, 1971. A temporary alimony hearing was held by court Referee Geron in the Greene County Court House, Xenia, Ohio on October 21, 1971. Counsel for the defendant, J. Gordon Rudd, held the office of County Judge in the Greene County Court House in addition to his law practice. At the hearing the plaintiff was ordered to pay child support, but temporary custody of the minor child was not ordered.

On June 15, 1972 the petitioner had physical custody of his child, when Beavercreek Township police arrived at his home with an ex parte order filed on June 15, 1972 in the Common Pleas Court, signed by attorney J. Gordon Rudd, but not signed by the court, granting temporary custody to the mother. The order was drawn up without a written motion showing with particularity the grounds therefore as required by Ohio Civil Procedure Rule 7(B)(1). (Appendix, p. A15)

A temporary custody hearing was held by Referee Geron in the Greene County Court House on June 29, 1972, whereupon temporary custody was again awarded to the mother. No transcript was taken nor was a report of the evidence presented

filed with the court, as required by Ohio Civil Procedure Rule 53(E) (Appendix, p. A18) in either the temporary alimony hearing or the child custody hearing.

Under Ohio law, a pre-trial order in a child custody issue requires an evaluation of both parties by a qualified agency or individual. A motion was made on July 11, 1972 specifically requesting an investigation by the Greene County Children's Services Board. The petitioner contacted the Children's Services Board and was assured the Board was willing and able to conduct the investigation requested provided an order was received from the court.

Approval was received from Judge Riley for the Children's Services Board to conduct the investigation, and an order was drawn up by counsel to that effect and filed August 4, 1972. Subsequent to the order, the petitioner was informed that the Children's Services Board would not conduct the investigation, but it is not known who altered the decision. The original order with Judge Riley's signature was altered with a black felt-tip pen, substituting a Divorce Investigator without date or initials as to when or who changed the order; no cause was shown.

On August 16, 1972 a Divorce Investigator, Ms. Maeder, a representative of Referee Geron's office, came to the petitioner's residence, talked briefly of the petitioner's financial condition, and toured the premises. The cursory investigation did not in any way conform to the requirements of Ohio Rule 75(D) in content or intent.

Following the final hearing for divorce, property settlement, and child custody held on August 30, 1972 whereby the petitioner was granted a decree of divorce, Judge Mitchell rendered a finding which was transcribed. In the awarding of custody of the minor child to the mother the court found, "with regard to the custody of the child, it is obvious the custody of the two-year old is better with the mother than with the father, everything else being equal." [Emphasis added.] It was this presumption in disregard of Ohio Revised Code Sections 2111.08, 3109.03, and 3109.04 that an appeal was taken to the Second District Court of Appeals by the petitioner.

The petitioner, through counsel, requested the written findings of the court on or about September 1, 1972 and received a copy on September 9, 1972. Ohio Civil Procedure, Rule 52 requires that written findings, when requested, become part of the court record. A "boiler plate" final judgment and decree of divorce was filed October 30, 1972, which entry did not contain the court's specific findings on child custody, as previously mentioned. (Appendix, p. A6)

Notice of appeal from the adverse custody order was filed November 24, 1972. At the same time a full transcript of the proceedings was requested by counsel. Subsequently counsel, through an arithmetic error, miscomputed the time in which the transcript was to have been filed, and then undertook diligent steps to bring the matter to the attention of the court. A motion was made to permit late filing of the transcript. Since counsel for the appellee had entered no objection, the full transcript was filed in the

Court of Appeals January 17, 1973, but the motion was denied on January 18, 1973.

Appellant's brief was prepared and timely filed on February 12, 1973; counsel for the Appellee did not file a brief. The Appellant then waived oral agrument, but the Court instead set the case down for oral argument by both parties on April 2, 1973, over the objection of Appellant's counsel and in conflict with Ohio Appellate Rule 18C. Following Appellant's argument on the merits of the case, Appellee's counsel made first reference to the late filing of the record--some three months after the filing. At no time prior to or during oral argument did the Appellee make any motion, either orally or in writing, as required by Ohio Appellate Rule 11C, to dismiss the case. The Appellate Court also refused to remand the case for inclusion in the trial court record of the judge's specific findings regarding child custody, even though such findings were required to have been filed in the lower court record. The Court instead dismissed the appeal sua sponte on May 15, 1973 for untimely filing of the transcript and lack of any basis in the trial court record for the appeal. Notice of appeal to the Supreme Court of Ohio was filed on June 3, 1973, and a memorandum in support of claimed jurisdiction was timely filed on July 3, 1973. The Ohio Supreme Court denied a motion to certify and dismissed the appeal on September 20, 1973.

STATE COURT JUDGMENT INVOLVED

The federal questions sought to be reviewed were first raised in the Second Appellate Court of

Greene County, Ohio by assignment of error in the findings of the trial court. The sole determinant of the trial judge's decision is capsulized in the following passage from his opinion,

> "With regard to the custody of the child, it is obvious the custody of the two-year old is better with the mother than with the father, everything else being equal." [Emphasis added.]

Assignment of Error

> "The Trial Court has relied upon an erroneous presumption of law as the basis of awarding custody of the parties' minor child to the Appellee and therefore the custody award must be reversed."

Sub-paragraph 5.

> "Preferential treatment on basis of sex violated the Equal Protection Clause of the U.S. Constitution and conflicts with both modern legislative policies and social realities."

The Appellate Court for Greene County, Ohio refused to consider the merits of the case, but instead dismissed the appeal on its own motion.

The federal issues sought to be reviewed were again raised in the Memorandum In Support of Claimed Jurisdiction submitted to the Supreme Court of Ohio.

> "Moreover, the Court's interpretation of the recently adopted Appelate Rules is

a matter of great interest to members of the public and of the legal profession, as well as involving a serious question of abridgment to Appellant's rights under the 14th Amendment of the U.S. Constitution. The novel and unequal application of certain Appellate Rules was such as to have deprived the Appellant of both due process and equal protection of the law and to have resulted in substantial injustice."

The Ohio Supreme Court declined to hear the case, thus perpetuating the denial of rights guaranteed under the Fourteenth Amendment of the U.S. Constitution.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Ohio Supreme Court has upheld Ohio Second District Appellate Court, which had impliedly sanctioned the departure by the Common Pleas Court from statutory and constitutional requirements that both parents be treated equally, without discriminitory preferences, in child custody matters. In every instance from the hearing of October 21, 1971 through the custody investigation of August 16, 1972 the decisions and the actions of the trial court and its representatives were blatantly discriminatory and conducted in total disregard of Ohio statutes, procedural rules and petitioner's and his child's rights.

The trial court deliberately avoided obtaining qualified and objective advice as to the more qualified parent, thereby denying the petitioner due

process. Ohio Civil Procedure Rule 75(P) provides clear guidelines to the court in granting custody, which were abridged in deference to traditional presumption and prejudice, and in direct contradiction to existing state and federal law. Moreover, the use and refusal to use certain Ohio Appellate Rules involved a serious abridgment to Appellant's rights under the Fourteenth Amendment of the U.S. Constitution. The novel and unequal application of those appellate rules deprived the Appellant of both due process and the equal protection of the law and to have resulted in substantial injustice. The petitioner has no other recourse than to seek ultimate fairness and equality in the nation's highest court.

The reasons this Court should grant certiorari can be demonstrated through the law and precedents applied to each of the questions presented.

1. This Court ruled that the custody of a minor could not be determined without due process of law in Application of Gault, 87 S Ct 1428. Now a father asks that this Court strike down the judicial determination of custody which denies the equal protection of the law through sexual discrimination. This Court has recently ruled that the equal protection of the law must be provided by striking down sexual discrimination in fringe benefits of employment, by enforcing female military personnel's rights to housing benefits for their dependants, in Frontiero v. Richardson, 93 S Ct 1764, and discrimination in part-time employment as estate administrators in Reed v. Reed, 404 U.S. 71. In Reed, the Court held that any classification based on sex was

suspect, and this Court is requested to examine, and strike down, the classification in the instant case inherent in the trial court's observation that that:

> "With regard to the custody of the child, it is obvious the custody of the two-year old is better with the mother than with the father, everything else being equal."

This Court should consider partenthood, and the resulting responsibility and great privilege of custody as employment, for what nobler employment can a person seek than the raising to adulthood of a helpless trusting child? Of course, 42 U.S. C. Sec. 2000(e) forbids discrimination by sex in employment.

In another area bearing more directly on the matter of discrimination by sex against a father, denying him custody, this Court ruled that an unmarried father could not be deprived of parenthood, and the happiness and responsibility of raising his children because he was a father, not a mother.

> We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

Stanley v. Illinois, 405 US 645, 31 L. Ed 2d 551, 557.

In Stanley, Illinois made a statutory determination that unwed fathers were unfit in order to save some expense and inconvenience in holding hearings for this class of parents to claim custody. In the instant case, the trial court of Ohio made an arbitrary decision, apparently to save itself some further deliberation since it had found both parents were equally fit for custody. In Stanley, Illinois' interest in reducing litigation and procedural steps was found not to be a powerful countervailing interest. Because of the bearing on the instant case, and every other contested family litigation, and the forthright nature of expression, this Court's opinion on the importance of the family, as stated in Stanley, 31 L. Ed 2d at 558-559, is reproduced here:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v Cooper, 336 US 77, 95, 93 L Ed 513, 527, 69 S Ct 448, 10 ALR 2d 608 (1949) (Frankfurter, J., concurring).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v Nebraska, 262 US 390, 399, 67 L Ed 1042, 1045, 43 S Ct 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v Oklahoma, 316 US 535, 541, 86 L Ed 1655, 1660, 62 S Ct 1110 (1942), and "[r]ights far more precious . . . than property rights," May v Anderson, 345 US 528, 533, 97 L Ed 1221, 1226, 73 S Ct 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v Massachusetts, 321 US 158, 166, 88 L Ed 645, 652, 64 S Ct 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v Nebraska, supra, at 399, 67 L Ed at 1045, the Equal Protection Clause of the Fourteenth Amendment, Skinner v Oklahoma, supra, at 541, 86 L Ed at 1660, and the Ninth Amendment, Griswold v Connecticut, 381 US 479, 496, 14 L Ed 2d 510, 522, 85 S Ct 1678 (1965) (Goldberg, J., concurring).

If, as held in Ohio law, all are equal, this petitioner claims that the mother is not, under the Constitution, entitled to preference.

2. Although the Ohio appellate courts have dismissed petitioner's pleadings, without hearing on the merits, for alleged technical deficiencies, they have overlooked the due process denials suffered by the petitioner and his infant child which have, at the hands of the courts and their opponents, denied them substantive rights. Early in the proceedings, the trial court, without the basic due process requirements of notice and a meaningful opportunity to be heard, changed custody from the father to the mother. This Court first struck down denial of due process in maintaining the "gut" right to put food on the table in Sniadach v. Family Finance, 89 S. Ct. 1820, and emphasized and expanded the right to enjoy property rights with due process protection in Lynch v. Household Finance, 92 S. Ct. 1113, Tucker v. Maher, 92 S. Ct. 1489, and Fuentas v. Shevin, 407 U. S. 67. Surely the liberty to exercise and enjoy parenthood by raising a child is of at least equal stature, and thus should be protected with all elements of due process, including notice and an opportunity to be heard.

Many state Supreme Courts have established for their states that custody is a constitutionally-guaranteed right that cannot be changed without notice and a hearing on the merits, commencing with Gitsch v. Wight (1922) 61 Utah 175, 211 Pac. 705, and reinforced in Abell v. Second Judicial District Court of Washoe County, 71 Pac. 2d 111, 112; Leonard v. Hoppins, 191 Pac. 2d 990, 992;

State v. Achor, 75 N. E. 2d 154, 157; Huger v. Huger, 20 N.W. 2d 848, 850; and Gordon v. Gordon, 17 So. 2d 191, 193.

Parenthood is a "substantial interest beyond the deprivation of due process by any court." In re White, 336 F. Supp. 735.

In Mabra v. Schmidt, 356 F. Supp. 260, it was ruled that visitation, a form of temporary custody, was, and is, a constitutionally-guaranteed right, which cannot be denied or removed without all the protections of due process of law.

In Hensley v. Municipal Court, 41 LW 4513 (1973), this Court ruled that any suspect limitation or deprivation of liberty, not only actual incarceration, merited examination in federal formus, to ensure due process rights. Surely the deprivation of custody is a limitation or deprivation of a substantial liberty, short of incarceration, which merits strict compliance with all Constitutional protections. In this respect, this petition for certiorari can be considered an application for habeas corpus, the "Great Writ," and treated as such by this Court. Johnson v. Avery, 89 S. Ct. 747. If it is considered that the acts of the state judge who served as lawyer for the respondent defendant here were under "color of law," then this Court can rule, as was done in Haley v. Troy, 338 F. Supp. 794, that the claim of discrimination and other suspect acts of a state judge in support cases established a federal question, and the Court can consider the instant facts in light of 42 U.S.C. Sec. 1983, 1984. U.S. v. Price, 86 S. Ct. 1152, 1157, footnote 7,

whereas if the Court considers his acts those of an individual acting privately with the respondent defendant, then 42 U. S. C. Sec. 1985(3) delineates rights of the petitioner. Griffin v. Breckinridge, 403 U. S. 88. The elements of a conspiracy to deprive the petitioner of his lawful right to custody of his infact child are present here, using the definition of conspiracy by Thomas, Lord Denman, as a "combination for accomplishing an unlawful end, or a lawful end by unlawful means." Rex v. Jones and Others, 4 B. & Ad. 345. Another ruling by L.C.J. Denman, cited in Gishwiler v. Dodez, 4 Ohio St. 615, that he "believed that there was not one judge who would not feel ashamed of the state of the law, and that it was such as to render it odious in the eyes of the country" seems particularly appropriate here, in this denial of due process in the exercise of a fundamental right. Chief Justice Warren Earl Burger put it a different way when he said, in St. Louis in 1971, that "Nothing rankles in the human breast so much as a sense of injustice."

Yet another essential element of due process of law lacking here is an impartial tribunal. Mayberry v. Pennsylvania, 400 U. S. 455. Since the trial court made a suspect ruling in favor of the respondent who was represented by a brother judge of the same bench, that ruling can be said to be tainted by the appearance of partiality, if not the actuality.

3. The Ohio law and Rules of Court are quite clear in specifying that no litigant is to suffer the loss of substantive rights due to procedural error not objected to by the opposition's counsel,

such as the late filing of a transcript. It becomes grotesque to deny the all-important right of effective parenthood (custody) when one transcript was not filed, while overlooking the lack of a transcript in the important hearing of June 29, 1972, as well as lack of a "report of the evidence" and the denial of an evaluation of both parties by a qualified agency under highly suspicious circumstances, even after approval for the evaluation was received from Judge Riley. To deny an effective or meaningful appeal procedure for late delivery of a transcript while overlooking the possibly criminal change of a court order is to complain about the mote in a neighbor's eye, while overlooking the beam in one's own.

4. It is obvious that the petitioner's (and his child's) due process rights were denied to the extent of reversibility of the decision when the Court of Appeals refused to have the trial judge's findings placed on the record, violating Ohio Civil Procedure Rule 52. Since there were no official "findings," there could be no basis in fact or law for the Ohio appellate court's ruling that the trial court had committed abuse of discretion or reversible error. This "act of ommission" on the part of the Ohio Appeals Court effectively denied the parent and the child an essential element of due process of law, effective appellate review. In re Gault, supra, at 1435.

5. In Gault, supra, this Court ruled on the rights of a minor to due process of law in a situation resulting in incarceration of the minor. In Pee v. U. S., 274 F. 2d 556, and Kent v. Chastian ___ F. 2d ___, the due process rights of minors in

civil matters concerning custody, as opposed to criminal matters, were upheld and expanded. In the instant case, this Court can make a definitive ruling on the rights of children in civil cases which will provide standards for family court judges throughout the nation, by finding that the precious rights of little Jayme Lynn Wolf were denied when her father was given procedural short shrift in the courts of Ohio.

This Court, in the abortion decisions, had considered the rights of the fetus, and has observed that guardians ad litem have been appointed to guard the legal rights of the yet unborn. Surely those who have been born, and caught up in the unhappy strife of their parents, have a right to be protected from the arbitrary, almost criminal, denials of due process, suspect classification, and suspicious acts of their elders in the family courts who are charged with a sacred trust, the responsibility to rule fairly and humanely in custody issues.

CONCLUSION

In order to examine the constitutional issues raised and unanswered in the courts below, and more firmly delineate the rights of minors, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

Gerald P. Wolf, pro se

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-604

GERALD P. WOLF,

Petitioner,

v.

TERRI L. WOLF

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner, IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 28, 1974.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 14th
day of December, 1973

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) City of Columbus)	1973 Term To wit: September 20, 1973
Gerald P. Wolf,) Appelant,)) vs.)) Terri L. Wolf,) Appellee.)	No. 73-562 APPEAL FROM THE COURT OF APPEALS FOR GREENE COUNTY

This cause, here on appeal as of right from the Court of Appeals for Greene County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Greene County for entry.

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

GERALD P. WOLF :
Plaintiff-Appellant :

vs. : Case No.

TERRI L. WOLF :
Defendant-Appellee :

DECISION ON MOTION

Rendered on the 18th day of January, 1973.

.....

Richard S. Sutton, Attorney at Law, 390 Talbott Tower, Dayton, Ohio 43402, Attorney for Plaintiff-Appellant

Terri L. Wolf, 2213 Bingham Ave., Kettering, Ohio 45402 for Herself.

.....

BY THE COURT:

This cause is before the court upon the motion of the appellant for an extension of time to transmit and file the record in the case.

The notice of appeal was filed on November 24, 1972. Hence, the time for filing the record expired on January 3, 1973. Upon discovering his error in the computation of time for filing the record, immediate steps were taken to perfect the appeal, but the request for an extension from the

trial court was refused because that court was without authority to grant the relief sought. Rule 10 (D).

Unfortunately, this court is in the same position. The provisions of Rule 10 (D) do not give this court unlimited discretion in the granting of such extensions, and the only reason advanced by the appellant for his failure to transmit the record within rule has been set forth as follows:

> "Appellant represents that a notice of appeal was filed by him, on November 24, 1972, from a judgment entered by the Greene County Court of Common Pleas on October 30, 1972; that a period of 40 days from the filing of the notice of appeal has expired on January 3, 1973; that due to the mistaken belief of counsel for the Appellant that the said notice of appeal had been filed on December 1, 1972, the transcript of the proceedings was not timely filed; and that the Greene County Court of Common Pleas is without authority to grant an extension of time within which to file and transmit the record on appeal for the reason that the time for said filing has expired."

If the trail court cannot, or will not grant an extension, this court "on motion for cause shown" may extend the time (Koykka: Ohio Appellate Process, Section 4.40), but the "cause shown" must be something more than a mere oversight. See Mayse v. Shannon Buick Co., 112 Ohio App. 113. This court has always been liberal in granting extensions within rule, but where no extension is requested,

the integrity of the rules has been maintained. See Andersen v. Industrial Commission, 135 Ohio St. 77; Peck v. County Commissioners, 28 Ohio Law Abs. 702; State, ex rel, Merrill v. Moore, 52 Ohio Law Abs. 301; Tucker v. Fergus, 30 Ohio Law Abs. 508; Lair v. Lair, 33 Ohio Law Abs. 544; Parrett v. Parrett, 42 Ohio Law Abs. 413; Fulkerson v. Roxanna Canning Co., 26 Ohio Law Abs. 607; Seifer v. Industrial Commission, 29 Ohio Law Abs. 52; Brown v. Brown, 35 Ohio Law Abs. 527; Strawser v. Stanton, 66 Ohio Law Abs. 124; Abdul v. Abdul, 72 Ohio Law Abs. 129; Nickerson v. Nickerson, 84 Ohio App. 516; Johnson v. Lawrence, 105 Ohio App. 262.

This dismissal of a case on procedural grounds alone is always a source of some apprehension, but the enforcement of a rule of court must of necessity be characterized with consistency. The only fair and reasonable alternative to consistent enforcement is complete abondonment. If the door is opened for one, it is open for all. Hence, our duty is clear. The motion for an extension will be overruled.

SHERER, P.J., CRAWFORD AND KERNS, J. concur.

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

GERALD P. WOLF 246 Woodcroft Train Dayton, Ohio 45430 Plaintiff	:	Case No. 44949
-vs-	:	
TERRI L. WOLF 2213 Bingham Drive Kettering, Ohio Defendant	:	FINAL JUDGMENT AND DECREE OF DIVORCE

This matter came on before the Court for hearing on the 30th day of August, 1972; upon the Complaint of the Plaintiff, Gerald P. Wolf and the Cross-Complaint of the Defendant, Terry L. Wolf. The respective divorce actions were contested and tried to the Court. The Court finds that the Defendant was duly served with summons according to law, and such service is hereby approved and confirmed, and the Court further finds that it has jurisdiction in the within action and over the matters set forth in the respective Complaints.

The Court further finds from the evidence adduced that the Plaintiff at the time of filing his Complaint had been a resident of the State of Ohio for more than one year prior thereto, and had been a bona fide resident of the County of Greene for ninety days previous thereto; and that the parties were married as set forth in the Complaint, and that one child has been born as issue of said marriage, to wit: Jayme Lynn Wolf, age 2, born July 5, 1970.

The Court further finds, upon the evidence adduced, that the Defendant has been guilty of gross neglect of duty as set forth in said Complaint, and by reason thereof the Plaintiff is entitled to a divorce as prayed for.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the marriage contract heretofore existing between the parties hereto, be and the same hereby is dissolved, and both parties are released from the obligations of same, and they are hereby divorced.

IT IS FURTHER ORDERED that the Defendant shall be and she is hereby awarded custory of the parties' minor child, subject to the reasonable visitation privileges of the Plaintiff, hereby defined for the time being, as alternating weekends from Saturday, 12:00 noon until Sunday at 6:00 p.m. The alternating weekend, the Plaintiff does not have the child, Plaintiff has the right to visit her on Sunday afternoon from the hours of 1:00 p.m. until 6:00 p.m. The Plaintiff shall also have the right of visitation on alternating legal holidays defined as follows: Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, and New Years Day. Beginning Thanksgiving of 1972, the Defendant shall initially have said child. During the visitation period of the aforesaid holidays, the Plantiff's visitation period shall be from the hours of 2:00 p.m. until 8:00 p.m.

IT IS FURTHER ORDERED that the Defendant shall not remove the child from the jurisdiction of this Court, which shall be defined as the State of Ohio,

until the Court after a hearing would permit said removal from the State of Ohio.

The Plaintiff shall have an additional period of visitation during the summer months for a two week period, that shall coincide with the Plaintiff's vacation schedule. It is further ORDERED that the matter of custody and visitation shall be subject to the continuing jurisdiction of this Court.

The Plaintiff shall be entitled to claim the minor child of the parties as his exemption for federal income tax purposes provided support payments are made consistent with this Decree.

The Court further orders that the 1969 Chevrolet Station Wagon shall be the sole and absolute property of the Defendant, and that the Plaintiff shall pay when due the loan balance owing on said Station Wagon, and shall indemnify and save harmless the Plaintiff thereon, and shall do what is necessary to convey title to the Defendant after the loan balance is satisfied. The Plaintiff shall be the sole and absolute owner of the 1961 Oldsmobile. The Court further orders that the Plaintiff shall pay to the Defendant, alimony in the amount of SEVEN HUNDRED EIGHTY DOLLARS ($780.00), to be discharged as follows: The Plaintiff shall pay to the Defendant, as and for alimony, the amount of $20.00 per week for a period of six months beginning Monday, September 4, 1972. After the said six month period the alimony payment shall be reduced to $10.00 a week until the alimony obligation is satisfied. The Court further orders,

as and for child support for the minor child of the parties, that the Plaintiff shall make support payments of $20.00 per week for a period of six months, beginning September 4, 1972. After the said six month period, the support payment shall be increased to $30.00 per week until further order of this Court. Payments for support and alimony shall be made directly to the Clerk of Courts, Greene County Court House, Xenia, Ohio. The Court further orders that any monies that the Plaintiff has borrowed from the minor child of the parties, shall be returned to said child. ($150.00 belonging to Defendant's children by a prior marriage.)

The Court further orders that the Defendant shall convey her interest in the real estate located at 246 Woodcroft Trail, Dayton, Ohio, 45430 to the Plaintiff by Quit Claim Deed. The Plaintiff shall assume and pay for the mortgage on said premises and hold the Defendant harmless thereon. If the Defendant fails to execute the aforesaid Quit Claim Deed within ten days after the Decree is filed, then the Decree shall be filed with the Clerk of Courts and act as a conveyance of the Defendant's interest in said real estate. The Plaintiff shall be the sole and absolute owner of all other real estate owned by him or the Defendant at the time of this divorce, and the Defendant shall do what is necessary to convey any interest in said real estate to the Plaintiff. The Plaintiff shall pay all debts of the parties that were jointly incurred during the marriage and are presently outstanding, and shall hold the Defendant harmless thereon.

It is further ordered that the Plaintiff shall be and he is hereby awarded a Final Judgment, and Decree of Divorce.

APPROVED:

_____

Judge

UNITED STATES CONSTITUTION

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1984. Same; review of proceedings

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 2000e—2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

OHIO REVISED CODE

§ 2111.08 Parents are natural guardians.
(GC § 10507-8)

The wife and husband are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education and the care and management of their estates. The wife and husband have equal powers, rights, and duties and neither parent has any right paramount to the right of the other concerning the custody of the minor, the control of the services or the earnings of such minor, or any other matter affecting the minor; provided that if either parent, to the exclusion of the other, is maintaining and supporting the child, such parent shall have the paramount right to control the services and earnings of the child. Neither parent shall forcibly take a child from the guardianship of the parent entitled to its custody.

In case the wife and husband live apart, the court may award the guardianship of a minor to either parent, and the state where the parent having the lawful custody of the minor resides has jurisdiction to determine questions concerning the minor's guardianship.

§ 2309.42 Extending rule day. (GC § 11347)

Upon such terms as are just, the court, or a judge thereof in vacation, for good cause shown, may extend the time for filing any pleading.

§ 2309.59 Reviewing court to disregard certain errors. (GC § 11364)

In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed or affected by reason of such error or defect. In the judgment of any reviewing court upon any appeal in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings and judgment under review. In case such reviewing court determines and certifies that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded, and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining. In case such reviewing court determines and certifies that in its opinion substantial justice has not been done to the party complaining as shown by the record, such court shall proceed as provided in section 2505.37 of the Revised Code.

§ 2315.22 Findings when case tried by court. (GC § 11421-2)

When the questions of fact are tried by the court, its findings may be general for the plaintiff or defendant, unless, with a view of excepting to the court's decision upon questions of law involved in the trial, one of the parties requests otherwise, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

§ 3109.03 Right of parent to custody. (GC § 8005-3)

When husband and wife are living separate and apart from each other, or are divorced, and the question as to the care, custody, and control of their offspring is brought before a court of competent jurisdiction, they shall stand upon an equality as to the care, custody, and control of such offspring, so far as parenthood is involved.

§ 3109.04 Custody.

Upon hearing the testimony of either or both parents, corroborated by other proof, the court shall decide which of them shall have the care, custody, and control of the offspring, taking into account that which would be for their best interest, except that if any child is fourteen years of age or more, it may be allowed to choose which parent it prefers to live with, unless the court finds that the parent so selected is unfitted to take charge. Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than five days before trial. The provisions permitting a child to choose the parent with whom it desires to live shall apply also to proceedings for modification of former orders of the court fixing custody. If the court finds, with respect to any child under eighteen years of age, that neither parent is a suitable person to have custody it may commit the child to a relative of the child or certify a copy of its findings, together with so much of the record and such further information, in narrative form or otherwise, as it deems necessary or as the juvenile court requests, to the juvenile court for further proceedings, and thereupon the juvenile court shall have exclusive jurisdiction.

RULE 3. Appeal as of right – how taken

(A) Filing the notice of appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.

(E) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

(D) Extension of time for transmission of the record; reduction of time. The trial court for cause shown may extend the time for transmitting the record. The clerk shall certify the order of extension to the court of

appeals. A request for extension must be made within the time originally prescribed or within an extension previously granted. If the trial court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The trial court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

11(C) **Dismissal for failure of appellant to cause timely transmission of record.** If the appellant shall fail to cause timely transmission of the record any appellee may file a motion in the court of appeals to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the trial court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within ten days of such service.

18(C) **Consequence of failure to file briefs.** If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, the court may dismiss the appeal. If an appellee fails to file his brief within the time provided by this rule, or within the time as extended, he will not be heard at oral argu-

ment except by permission of the court upon a showing of good cause submitted in writing prior to argument; and in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.

OHIO RULES OF CIVIL PROCEDURE

6. **(B) Time: extension.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D) and Rule 60(B), except to the extent and under the conditions stated in them.

7. **(B) Motions.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing. A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

RULE 52. Findings by the court

When questions of fact are tried by the court without a jury, its findings may be general for the prevailing party. Judgment may be entered if the court states in writing its findings of fact separately from its conclusions of law. Otherwise the court shall give the parties notice of its decision before entering judgment. Within fourteen days after receipt of notice of the decision a party may make a written request for the court to state its findings of fact separately from its conclusions of law. If the request is timely served upon the court, the court shall state in writing its findings of fact separately from its conclusions of law before entering judgment.

When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.

Findings of fact and conclusions of law required by this rule and by Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12 and Rule 56.

An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and Rule 41(B)

53(E) **Report.**

(1) Contents and filing. The referee shall prepare a report upon the matters submitted to him by the order of reference. He shall file the report with the clerk of the court and shall mail a copy to the parties. In an action on the merits of an issue to be tried without a jury,

he shall file with his report a transcript of the proceedings and of the evidence only if the court so directs.

(2) Action on the report. Within fourteen days after the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (D). The court may adopt the report or modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) Stipulation as to findings. The effect of a referee's report is the same whether or not the parties have consented to the reference. When the parties stipulate in writing that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

RULE 61. Harmless error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

75(D) **Investigation.** On the filing of a complaint for divorce, annulment or alimony, where minor children are involved, or on the filing of a motion for change of custody of minor children, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than seven days before trial. Such report shall be signed by the investigator and the investigator shall be subject to cross-examination by either party concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

75 **(P) Custody and change of custody of children.** Upon hearing, the court shall decide which of the parents shall have the care, custody and control of the children, taking into account only that which would be for the best interests of each child. Any child over fourteen years of age may be allowed to choose which parent it prefers to live with, unless the court finds that the parent so selected is unfit to take charge. Prior to hearing, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of the parties to the action. The report of such investigation shall be made available to either party or his counsel of record upon written request not less than seven days before trial. Such report shall be signed by the investigator and the investigator shall be subject to cross-examination by either party concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

Provisions permitting a child to choose the parent with whom it desires to live shall apply also to proceedings for modification of former orders fixing custody.

If the court finds, with respect to any child under eighteen years of age, that neither parent is a suitable person to have custody, it may commit the child to any other relative of the child who shall have care, custody and control of the child. If the court, in the exercise of its discretion, finds that the child has no relative who is a suitable person to have custody, it may certify the cause to the juvenile court for further proceedings. When the court certifies the cause to the juvenile court it shall send the juvenile court a copy of the court's findings, together with so much of the record and such further information, in narrative form or otherwise, as it deems necessary or as the juvenile court requests. Thereupon the juvenile court shall have exclusive jurisdiction over the care, custody, control and support of the child.